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No. 93-896

In the Supreme Court of the United States

OCTOBER TERM, 1993

SHANTEE MONGA AND DHARAM DEV MONGA,
PETITIONERS,

v.

GLOVER LANDING CONDOMINIUM TRUST, *et al.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it was error for the First Circuit to uphold the District Court's award of attorney fees, where no opposition to these fees was made in the District Court, and where the arguments in opposition to the fee award were raised for the first time on appeal?

PARTIES

Petitioners and respondents are identified in the petition. Respondent Glover Landing Condominium Trust, a trust organized under Mass. Gen. L. c. 183A, has no parent company and no subsidiaries or affiliates.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Petitioners Shantee and Dharam D. Monga are a married couple who owned a condominium unit in the Glover Landing condominium complex located in Marblehead, Massachusetts. They brought suit in October, 1988 against Glover Landing Condominium Trust ("GLCT"), Marvin Frank and Mary Hession (collectively the "respondents" or the "defendants"), alleging various acts of housing discrimination under state and federal law, interference with the exercise of state- and federally-protected civil rights, breach of contract, breach of fiduciary duty, slander, interference with contractual relationships, and intentional infliction of emotional distress.

The parties engaged in discovery from approximately November, 1988 through January, 1991. In October, 1990 the District Court granted partial summary judgment to the respondents and dismissed six of the fourteen counts of the complaint. Thereafter, the Court set an initial trial date of April 1, 1991, which was continued at the Mongas' request until January 6, 1992.

The case was finally set for trial on February 3, 1992. Mr. Monga appeared in court on that date and requested a continuance, which the judge denied. Mrs. Monga did not appear in court at all on the date of trial. Mr. Monga announced himself unprepared to go forward, and the District Court dismissed the case, with prejudice, for failure to prosecute. Respondents thereupon filed a motion for attorney's fees, which the District Court granted on March 13, 1992, no opposition having been filed by the Mongas.

The Mongas filed separate appeals from the dismissal of their lawsuit and the award of attorney's fees. The appeal from the dismissal was, in turn, dismissed by the First Circuit for failure to prosecute (Docket No. 92-1288). The appeal from the award of attorney's fees was denied by the First Circuit on March 1, 1993, because the Mongas had failed to either oppose the fee motion or to seek reconsideration from the District Court following its award of fees. *See Monga v. Glover Landing Condominium Trust*, First Circuit Docket No. 92-1478 (March 1, 1993), *unpublished slip. op. (per curiam)*. A first motion for reconsideration (filed late by leave of the Court) was denied by the First Circuit on July 8, 1993. A second motion for reconsideration was denied by the First Circuit on October 7, 1993. Finally, on November 8, 1993, the Court of Appeals summarily denied the Mongas' so-called "supplement" to their second motion for reconsideration (treating this "supplement" as a third motion for reconsideration), in which the Mongas raised for the first time in any court the Fifth and Eighth Amendment arguments set forth, among others, in their petition to this Court.

II. REASONS FOR DENYING THE WRIT

The petition for writ of certiorari seeks to bring before this Court a decision by the First Circuit denying an appeal from a District Court fee award to which no opposition had been filed. The fee award came in response to a motion filed by respondents at the close of nearly four years of litigation, and was supported by 84 pages of attorney diaries and billing records, an affidavit of counsel certifying that the amounts shown were accurate and reflected customary rates, and a 12 page memorandum of law detailing the factual and legal bases justifying a fee award.

In declining to find any error by the District Court -- where the petitioners had wholly abjured from drawing the alleged grounds of error to the attention of the District judge (either by opposing the fee motion or by moving for reconsideration when the motion was allowed) -- the First Circuit applied well-settled principles of appellate procedure. In refusing to consider arguments made by petitioners for the first time on appeal (and in finding no error by the District Court judge in having failed expressly to address those arguments where they had never been addressed to him), the First Circuit followed the consistent teachings of this Court, and of every circuit, on a fundamental principle of trial and appellate practice which petitioners simply chose to ignore. The petition does not present any issue warranting review by this Court, and should be denied.

A. *Petitioners Have Waived Any Argument That the Fees Awarded Were Unreasonable, And The District Court's Allowance Of The Fee Petition Was In Any Event Without Error.*

The petition attacks a decision of the First Circuit which, far from providing any occasion for review by this Court, instead rests on one of the most basic and well-accepted rules of Federal jurisprudence: with limited exceptions, "issues not raised in the district court may not be raised for the first time on appeal."

Monga v. Glover Landing Condominium Trust, First Circuit No. 92-1478, *supra* (hereafter "First Circuit Op."), Petitioners' Appendix (hereafter "Pet. App.") at 3 (quoting *Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59, 64 (1st Cir. 1991). *Accord, Thomas v. Arn*, 474 U.S. 140, 148 (1985), *reh'g denied*, 474 U.S. 111 (1986); *Kraebel v. New York City Dept. of Housing Preservation & Dev.*, 959 F.2d 395, 401 (2nd Cir.), *cert. denied*, 113 S. Ct. 326 (1992); *Heller v. United States*, 776 F.2d 92, 98 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); *Bakker v. Grutman*, 942 F.2d 236, 242 (4th Cir. 1991); *In re Meyerland Co.*, 960 F.2d 512, 519 (5th Cir. 1992), *cert. denied, Meyerland Co. v. FDIC*, 113 S. Ct. 967 (1993); *Chandler v. Jones*, 813 F.2d 773, 77 (6th Cir. 1987); *Magicsilk Corp. of New Jersey v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991); *Empire State Bank v. Citizens State Bank*, 932 F.2d 1250, 1253 (8th Cir. 1991), *reh'g denied*, 1991 U.S. App. LEXIS 18, 486 (1991); *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985); *DeLoach v. Bevers*, 922 F.2d 618, 124 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 65 (1991); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir. 1990).

As the First Circuit noted, "it is black letter law that it is a party's first obligation to seek any relief that might fairly have been thought available in the district court before seeking it on appeal." First Circuit Op., Pet. App. at 4 (quoting *Beaulieu v. United States I.R.S.*, 865 F.2d 1351, 1352 (1st Cir. 1989)). As the First Circuit also observed, this established principle of Federal practice has consistently been applied to the award of attorney's fees. *See Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) (a party's failure to challenge in the district court the accuracy and reasonableness of the hours claimed in a fee petition or the facts asserted in the affidavits accompanying that petition waives her right to challenge on appeal the district court's determination that the number of hours billed was reasonable); *Magicsilk Corp of New Jersey v. Vinson, supra*, 924 F.2d at 125 (by failing to raise any objection to the fee petition in the district court either prior to or after the court's ruling on that petition, fee target has waived right to argue the issue of fees on appeal).

Having failed to either oppose the fee petition when it was filed or request reconsideration when the petition was allowed, the

Mongas cannot now complain of the decisions of either of the Courts below.[1]

To be sure, the rule precluding appellate review of matters not raised below may, as the First Circuit noted, be set aside by the appellate court *in its discretion* under limited and carefully circumscribed conditions. *See* First Circuit Op., Pet. App. at 4 ("We may dispense with the raise or waive rule in an exceptional case to avoid a gross miscarriage of justice"); *see also Singleton v. Wulff*, 428 U.S. 106, 121 ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). The use of this discretionary and narrow authority, which the petitioners apparently confuse with a binding duty, was in fact weighed in the present case by the First Circuit, which discerned "no basis for the exercise of that power here." First Circuit Op. *id.*

As the First Circuit found, the Mongas offered no legitimate excuse for their failure to oppose the fee filing, much less for their failure to seek reconsideration by the District Court when the fees were allowed. Moreover, as the Court of Appeals held, both the determination that fees were warranted under the relevant legal

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[1] The Mongas' claim that their waiver was "inadvertent" is both beside the point and without support in the record. A party need not specifically intend to waive an argument -- in contrast, for example, to a constitutional right -- in order for a waiver to occur. Moreover, as the First Circuit observed, the Mongas' assertion that they were somehow caught off guard by the District Court's allowance of a properly served fee petition is both implausible and, in any event, cannot explain or excuse their failure to seek reconsideration from the District judge, and to address to him (and thereby provide record evidence of) the factual bases which might support their present claim of "inadvertence." Having failed to do so, the Mongas have left a record which could not support a finding of inadvertence (even if such a finding were legally relevant, which it is not) and which suggests, if anything, a strategic decision to by-pass the District judge.

standards, and the approval in full of the fees requested, were amply supported by the unopposed record. Plainly, under these circumstances, the First Circuit cannot be found to have abused its discretion in declining to address the Mongas' untimely assignments of error. Just as plainly, and by stronger force, this case cannot provide any basis for this Court's consideration.[2]

The First Circuit's conclusion that the District Court in any event committed no error in its "succinct granting of the request in full as reasonable fees and costs", First Circuit Op., Pet. App. at 8, is equally unassailable. The District Court's forbearance to provide a detailed rationale for its allowance of the unopposed fee

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[2] The petitioners' citation to *Monaghan v. Hill*, 140 F.2d 31 (9th Cir. 1944), for the proposition that a party is not required to draw alleged errors to the attention of the trial court in the first instance is wholly without merit. In *Monaghan*, the Court of Appeals held that a party requesting fees, where the fee request was supported by record evidence and not opposed, was not barred from contesting on appeal the trial court's *reduction* of the fees requested, even though no exceptions had been taken to the findings of the motion judge, and even though no request for amendment was filed. *Monaghan* simply stands for the unremarkable proposition that, where a proper evidentiary foundation has been laid, a party need not--in order to preserve the point for appeal--object to findings which are contrary to the uncontradicted evidence. *Monaghan* is of no help to the petitioners, who failed to put in any evidence in support of their present opposition, or to suggest to the District Court any way in which the legal arguments and evidence supporting the fee application were wanting.

Nor does *Hormel v. Helvering*, 312 U.S. 552 (1941), advance petitioners' cause. In *Hormel*, this Court merely recognized the discretionary *authority* of an appellate court to review issues not raised below "in exceptional cases or particular circumstances," *id.* at 557, and found no abuse of that authority on the facts of that case. As noted above, the First Circuit was fully aware of its authority in this respect, and appropriately found no circumstances warranting its exercise.

application gave rise to no occasion for appellate correction. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1482 (9th Cir.), *cert. dismissed*, 113 S. Ct. 454 (1992) (where fee target does not object to the amount of fees claimed, district court not required to make detailed findings). Having failed to suggest to the District judge any aspect in which the fee application might be deficient, and having failed to request further elucidation from the District Court upon its allowance of the fee petition in full as "reasonable," the Mongas received from the District Court all that to which they were entitled.[3]

Moreover, notwithstanding its holding that the Mongas had waived any right to challenge the District Court's fee award, the First Circuit nonetheless *did* consider the substance of their claims. The First Circuit could find no abuse of discretion in the District Court's determination that the fee petition was both warranted ("the facts concerning the Mongas' conduct of this litigation, outlined in the defendants' fee petition, are unopposed and, in any event, are abundantly supported even by a superficial reading of the record"; First Circuit App., Pet. App. at 5) and in an amount "represent[ing] reasonable fees and costs." *Id.* at 5-7. Indeed, as the First Circuit observed, the trial judge would have

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[3] The petition goes to great length and detail in attacking the fee request as "unreasonable on its face" because, it is claimed, the Mongas' bad conduct directly caused only a portion of the costs incurred. See Petition at 6-9. This attack proceeds from the mistaken assumption that an award of fees, in response to a pattern of vexatious conduct (such as the record shows and as the First Circuit found to exist in the present case) or otherwise groundless litigation (as the record also demonstrates here), must be limited to costs specifically incurred in defense of particular frivolous acts, and may not extend to the whole costs of defense. As this Court has just recently held, however, such is not the law. *See, e.g., Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2139 (1991). As well, the Mongas' detailed analysis hardly shows the petition to have been unreasonable "on its face" and is, instead, precisely the type of argument which ought to have been addressed to the District Court when the petition was filed.

exceeded his authority had he disregarded the uncontested evidence as to the accuracy and reasonableness of the fees requested, unless based on his personal knowledge as to the actual time expended on the case. *Id.* at 7-8, citing *McDonald v. McCarthy*, 966 F.2d 112, 118-19 (3rd Cir. 1992).

Contrary to the impression given by the petition, the Court of Appeals properly recognized the existence of the limited *power* of a District judge, exercising the particularly broad discretion afforded him in fee determinations, to alter an uncontested fee request, or a request contested in only a perfunctory manner.[4] No decision of the First Circuit, or of any other Court of Appeals,

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[4] *Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984), and *Foley v. Lowell*, 948 F.2d 10 (1st Cir. 1991), cited by the First Circuit, are cases of this variety. In both cases, the First Circuit acknowledged that it was within the District Court's discretion to reduce fee petitions; in neither case did the Court of Appeals suggest that it would have been an abuse of discretion for the District Court to have allowed the petitions in full or that the usual "raise or waive" limitations would not have applied to appellate review of such an allowance. Accordingly, neither *Wojtkowski nor Foley* supports the petitioners' assertion of a "conflict" within the First Circuit on this point. Indeed, *Foley* itself contains the strong caution that it is not "the court's job either to do the [fee] target's homework or to take heroic measures at saving the target from the predictable consequences of self-indulgent lassitude", Foley, supra at 20-21, a caution seemingly ignored by petitioners here.

Nor does the petitioners' citation to *Gabriele v. Southworth*, 712 F.2d 1505 (1st Cir. 1983), add any support to the claim of an intra-circuit "split". In *Gabriele*, the First Circuit undertook a particularly searching review of a fee award where that award had been hotly contested below, and where the fee target had suggested some impropriety in the District Court judge's approval of fees sought by his former law clerk. No suggestion of waiver appears to have been made before the First Circuit, nor does the opinion in that case give any hint that the waiver issue was considered by the Court on its own.

however, can fairly be read to suggest that the District Court is *required* to make such alterations *sua sponte*, or abuses its discretion when it declines to do so. Here again, as with the narrow license of an appellate court to review issues not preserved at trial, the petition confuses limited discretionary judicial *power* with some supposed judicial *obligation*. No such obligation, however, exists. Accordingly, as the First Circuit observed, the Mongas' "transparent attempt to deflect blame for their present position onto the district court is unconvincing." First Circuit Op., Pet. App. at 8.[5]

The petitioners raise a separate point (made, as with all their objections, for the first time only on appeal) concerning the imposition of joint and several liability. In addition to suffering the same procedural infirmities as its companion allegations, this argument bears the further defect of contradicting the Mongas' own prior pleadings. In urging that joint and several liability cannot be established, the petitioners point out that, as a non-citizen, Shantee Monga could not ultimately have maintained her claims under 42 U.S.C. § 1982, and assert that fee-shifting would, as to Ms. Monga, therefore be inappropriate. That Ms. Monga's asserted claims under § 1982 were from the outset spurious, as the Mongas now concede, can hardly provide any basis for the avoidance of fees designed to deter precisely such frivolous

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[5] As to the suggestion that respondents have "nowhere . . . claimed that the fees sought were reasonable," Petition at 5, this is on par with faulting a party who has sworn under oath that he did everything he could do to avoid an accident, but has nowhere testified that he was not negligent. A party's disinclination to assert in an affidavit the ultimate conclusion to be determined by the Court (*viz.*, that the hours expended and the fees charged were "reasonable"), while setting forth all of the facts necessary for that determination (and citing to the Court those statutes which would permit an award of "reasonable" fees and costs) is simply a recognition of the appropriate boundary between facts which may be sworn to by a party, and conclusions of law which only the Court may deliver.

claims. Common sense, of course, dictates precisely the opposite result.

Similarly, the suggestion that Ms. Monga was not a party to any contract, and should therefore have been excused from fee liability related to the Mongas' contract claims, flies in the face of petitioners' complaint alleging damages on behalf of both plaintiffs under a contract theory. Only slightly less incredible is the apparent suggestion that Ms. Monga's status as a non-lawyer should free her from liability under fee-shifting statutes which hold to financial account the parties to frivolous litigation, and not their legal counsel.

B. Petitioners' Claims Under The Excessive Fines And Due Process Clauses Of The United States Constitution Have Been Waived In Each Of the Courts Below, And Are Without Merit In Any Event.

The petition's suggestion that an award of attorney's fees may violate the Eighth Amendment's Excessive Fines Clause or the Due Process Clause of The Fifth Amendment fares no better than its attack on the reasonableness of the award. The possibility of an Excessive Fines or Due Process claim was never raised before the District Court, and these claims are therefore waived. Contrary to the petitioners' suggestion, purportedly buttressed by cases involving the standard for determining a waiver of a criminal defendant's constitutional *rights*, *see Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel), no more lenient rule than that discussed above applies to the loss, through procedural default, of a constitutionally-based defense or objection. *See, e.g.*, *Doucette v. Ives*, 947 F.2d 21, 30-31 (1st Cir. 1991) (constitutional argument not made in district court waived for purposes of appeal); *Cecos Int'l Inc. v. Jorling*, 895 F.2d 66, 70 (2nd Cir. 1990) (same); *Heller, supra*, 776 F.2d at 98 (3rd Cir.) (same); *Collins v. Trinity Indus. Inc.*, 861 F.2d 1364, 1365-66 (5th Cir. 1988) (same); *U.S. v. National Steel Corp.*, 767 F.2d 1176, 1182 (6th Cir. 1985) (same); *Beard v. J.I. Case Company*, 823 F.2d 1095, 1104 n. 9 (7th Cir. 1987) (same); *MSM Farms Inc. v. Spire*, 927 F.2d 330, 334-335 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 65 (1991) (same); *Benigni v. City of Hemet*, 879 F.2d 473, 477 (9th

Cir. 1988), *reh'g denied*, 882 F.2d 356 (1989) (same); *Long v. Shillinger*, 927 F.2d 525, 528 (10th Cir. 1991) (same).

Indeed, the Mongas did not even raise these constitutional claims before the Court of Appeals until their *third* motion for reconsideration, thereby waiving these points in the First Circuit as well. *See Costo v. United States*, 922 F.2d 302, 303 (6th Cir. 1990) (arguments not raised in appellate brief may not be raised for the first time in petition for reconsideration); *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986), *cert. denied*, 489 U.S. 1032 (1989) (declining to consider argument in petition for rehearing where not raised in original appeal brief); *Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1988) ("Petitions for rehearing under Fed. R. App. P. 40(a) are permitted to enable parties to notify, and to correct, errors of fact or law on the issues already presented; they are not meant to permit parties to assert new grounds for relief."). Accordingly, there could have been no error in the First Circuit's summary denial of the third motion for reconsideration, and that denial cannot serve as the basis for review by this Court. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (general rule that where issues were neither raised before nor considered by Court of Appeals, Supreme Court will not consider them); *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987), *reh'g denied*, 481 U.S. 1033 (1987) (same); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (same).

Moreover, even if the Mongas had properly preserved their newly-enunciated constitutional claims, those claims are manifestly without merit. As to the Excessive Fines argument, the Mongas have cited no case, and respondents' research has discovered none to exist, suggesting that an award of attorney's fees, much less an award of fees to a non-governmental party to a civil suit, implicates the Eighth Amendment at all. Indeed, the case primarily relied on by the petitioners, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), points to precisely the opposite conclusion. Even if attorney's fees were viewed, as the Mongas suggest they should be, as a form of judicially-imposed punishment, the Court in *Browning-Ferris* expressly rejected the application of the Eighth Amendment to this sort of penalty:

> The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take. While we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties . . . We shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.

Id. at 275-76. Further, the Mongas have failed to suggest how an award of "reasonable" attorney's fees, recompensing the prevailing party for its actual damages incurred through vexatious litigation, could ever satisfy the element of "excessiveness" which is requisite to any Eighth Amendment claim (and, having forfeited through inaction their right to attack the reasonableness of the fees awarded in the present case, the Mongas cannot resurrect a complaint of unreasonableness in the guise of a constitutional claim).

Similarly, as to their untimely claim under the Due Process Clause of the Fifth Amendment, the Mongas have cited no case suggesting that an award of reasonable attorney's fees might raise the specter of "punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). To the contrary, the standards for the award of fees, the procedural safeguards attending the fee process, and the concrete and uncontested evidence presented to the District Court of petitioners' vexatious conduct and of the actual litigation costs reasonably incurred by respondents in the present case (on the basis of which the fee petition was allowed) all underscore the constitutional "reasonableness" of the "reasonable attorney's fee" award. That the Mongas failed properly to avail themselves of those procedures, or to suggest in the appropriate forum why the applicable standards might not have been met, leaves them no more ground to complain of constitutional unreasonableness than is available to them in attacking, well after the fact, the fee award itself.

C. Enforcement Of The Fee Award Is Not Contrary To Any Public Policy.

With no support for their position in either the law or the facts, the petitioners seek refuge in allusions to public policy, suggesting that the allowance of the fee award in this case somehow involves some undefined "public interest." Clearly, however, no public interest can be offended by the award of fees necessitated by the defense of frivolous litigation. Nor is public policy undermined by requiring plaintiffs here to observe basic rules of Federal practice, or to risk the consequences of their knowing failure to do so. Rather, public policy requires that the pursuit of frivolous litigation carry some consequences, and that parties not be permitted to flout with impunity and without excuse the requirements of contemporaneous objection. *See Thomas v. Arn, supra*, 474 U.S. at 147-148 (upholding rule that objections not made to magistrate's finding are waived, and stating that the rule, "by precluding appellate review of any issue not contained in objections, prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing.").

In sum, the petition presents no matter of law on which the circuits are at odds, and no issue, either of law or policy, of such general importance as to otherwise merit this Court's review.

III. CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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